Supreme Court, U. S.
FILED
AUG 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-362

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD W. FAUSNER *and* ANITA C. FAUSNER,
*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether Section 7483 of the Internal Revenue Code (26 U.S.C.) violates procedural due process under the Fifth Amendment to the Constitution of the United States, in that there is no "provision" in the statute allowing for any form of "notice" from the Clerk of the Tax Court to the taxpayer of an adverse decision by that Court.

2. Whether Section 7483 of the Internal Revenue Code (26 U.S.C.) violates notions of the equal protection of the law embodied in the Fifth Amendment to the Constitution of the United States, by discriminating against residents on the west coast of the United States as compared to residents on the east coast.

3. Whether Federal Rule of Appellate Procedure 26(c) should be applied in computing the permissible time for filing a notice of appeal pursuant to 28 U.S.C. 7483. Rule 26(c) allows three extra days in which to file an appeal when the postal service is utilized as a means of communication.

# TOPICAL INDEX


| | Page |
|---|---|
| QUESTIONS PRESENTED | 2 |
| OPINIONS BELOW | 3 |
| JURISDICTION | 3 |
| STATUTES INVOLVED | 4 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING WRIT | 9 |
| A. The Fifth Amendment to the United States Constitution Provides for Both Procedural Due Process Protection and Equal Protection of the Law. | 9 |
| B. Once a Method for Appellate Review has Been Established as a Matter of Right, it Must be Exercised Without Discrimination. | 14 |
| C. One of the Basic and Fundamental Requirements of Procedural Due Process is Notice. | 18 |
| D. When the Postal Service is Utilized as a Means of Communication, Additional Time in Which to File a Notice of Appeal Must be Allowed. | 23 |
| CONCLUSIONS | 26 |

Page

Appendix A -

Order of the United States Court of Appeals for the Ninth Circuit 27

Appendix B -

Petitioners' Notice of Appeal to the Clerk of the United States Tax Court. 29

Appendix C -

Statutes Involved. 31

TABLE OF CASES


| | Page |
|---|---|
| Boddie v. Connecticut, 401 U.S. 371 (1971) | 19 |
| Bolling v. Sharpe, 347 U.S. 497 (1954) | 12 |
| Bolton v. Harris, 395 F.2d 642 (1968) | 13 |
| Coe v. Armour Fertilizer Works, 237 U.S. 413, (1915) | 23 |
| Covey v. Town of Somers, 351 U.S. 141 (1956) | 20 |
| Frontiero v. Richardson, 411 U.S. 677 (1973) | 13 |
| Fuentes v. Shevin, 407 U.S. 67 (1972) | 19 |
| Griffin v. Griffin, 327 U.S. 220 (1946) | 19 |
| Lindsey v. Normet, 405 U.S. 56, (1971) | 16 |
| Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950) | 19 |
| Oppenheimer v. Roth, 468 F.2d 901, (Ninth Cir. 1972) | 16 |
| Robinson v. Beto, 426 F.2d 797 (Fifth Cir. 1970) | 16 |

Page

Schlesinger v. Ballard,
419 U.S. 498 (1975) 13

Schneider v. Rusk,
377 U.S. 163 (1964) 13

Schroeder v. City of New York,
371 U.S. 208 (1962) 19

Shapiro v. Thompson,
394 U.S. 618 (1969) 13

United States v. Thoresen,
428 F.2d 654 (1970) 13

Weinberger v. Wiesenfeld,
420 U.S. 636 (1975) 13

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1980

No. _____

DONALD W. FAUSNER AND

ANITA C. FAUSNER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR A WRIT CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

DONALD W. FAUSNER and ANITA C. FAUSNER, petitioners herein, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-titled case on May 12, 1980.

## QUESTIONS PRESENTED

1. Whether Section 7483 of the Internal Revenue Code (26 U.S.C.) violates procedural due process under the Fifth Amendment to the Constitution of the United States, in that there is no "provision" in the statute allowing for any form of "notice" from the Clerk of the Tax Court to the taxpayer of an adverse decision by that Court.

2. Whether Section 7483 of the Internal Revenue Code (26 U.S.C.) violates notions of the equal protection of the law embodied in the Fifth Amendment to the Constitution of the United States, by discriminating against residents on the west coast of the United States as compared to residents on the east coast.

3. Whether Federal Rule of Appellate Procedure 26(c) should be applied in computing the permissible time for filing a notice of appeal pursuant to 28 U.S.C.

7483. Rule 26(c) allows three extra days in which to file an appeal when the postal service is utilized as a means of communication.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. The judgment and order of the United States Court of Appeals for the Ninth Circuit is printed in Appendix A. The opinion of the United States Tax Court, can be found in T.C. Memo. 1979-348.

## JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 12, 1980. A petition for rehearing was not filed in this matter. The jurisdiction of the Supreme Court is invoked under 28 U.S.C.A. Section 1254(1).

## STATUTES INVOLVED

The statutes which are discussed and cited in this petition have been printed in Appendix C.

## STATEMENT OF THE CASE

The reason for the filing of this petition is to determine the issues presented above and whether or not the United States Court of Appeals for the Ninth Circuit was sufficiently justified in dismissing petitioners' appeal because of their failure to file a timely Notice of Appeal from the decision of the United States Tax Court.

For convenience, references herein to the "petitioner" shall refer to the co-petitioner herein, DONALD W. FAUSNER, and references to the "petitioners" shall refer to DONALD W. and ANITA C. FAUSNER. Since the tax returns in question were filed on a joint return basis, the

petitioner and his wife, ANITA C. FAUSNER, appear as co-petitioners in the matter before this Honorable Court and in the inferior courts.

The subject Tax Court case involves a dispute over deductions claimed by the petitioner on his 1973 and 1974 federal income tax returns (Form 1040) for local transportation costs incurred for automobile transportation between the petitioner's personal residence in San Diego, California, and his principal post of duty at the Los Angeles International Airport, in the respective amounts of $2,082.00 and $2,737.50, all of which are in dispute. The case was tried before the Honorable Charles R. Simpson at San Diego, California, on March 27, 1979, and was submitted for adjudication on a stipulation of facts, the oral testimony of the petitioner, and stipulated exhibits. The decision of the Honorable Judge of the

Tax Court was filed August 30, 1979, as T.C. Memo. 1979-348, wherein the Tax Court ruled that the petitioner was not entitled to deduct any of said transportation costs.

Notice of the Tax Court's decision was received at the address of the law firm of Treitler & Associates on or about September 3, 1979. Wishing to exercise their right to appeal the adverse decision of the Tax Court, the petitioners, by and through counsel, filed their Notice of Appeal with the Clerk of the United States Tax Court in Washington, D.C. (Petitioners' Notice of Appeal is printed in Appendix B). On November 28, 1979, a date 90 days after the entry of the Tax Court's decision, the Notice of Appeal was deposited in a United States Post Office mailbox, located on Clairemont Mesa Boulevard in San Diego, California. The envelope which carried said Notice of Appeal was postmarked by a private postal

meter and dated "November 28, 1979." The depositing of the "metered" Notice on November 28, 1979, would, pursuant to 26 U.S.C. 7502, constitute a timely filing of the Notice within the requisite 90-day period.

However, the envelope containing the Notice of Appeal was also stamped with a United States Postal Service postmark. That postmark bore the date of November 29, 1979. Therefore, there were two postmarks appearing on the envelope: one dated November 28, 1979, (the private meter) and one dated November 29, 1979 (the United States Postal Service postmark).

On or about March 13, 1980, counsel for the respondent/appellee, Commissioner of Internal Revenue, filed with the United States Court of Appeals for the Ninth Circuit a Motion to Dismiss Appellants' Appeal for Lack of Jurisdiction. The Commissioner claimed that the petitioners

had untimely filed their appeal pursuant to 26 U.S.C. 7483 and Section 301.7501(c)(iii) of the Treasury Regulations on Procedure and Administration (1954 Code, 26 C.F.R.). The filing, it was claimed, was completed on the 91st day instead of the required 90th day, because the envelope containing the Notice of Appeal bore the United States Postal Service postmark. This, in turn, superseded the private metered postmark.

On or about April 9, 1980, the petitioners, by and through their counsel, filed in the United States Court of Appeals for the Ninth Circuit, a memorandum in opposition to the appellee's Motion to Dismiss. That memorandum raised various constitutional arguments, which are more specifically raised in this Petition for Certiorari.

On or about May 12, 1980, the United States Court of Appeals for the Ninth

Circuit issued its order and decision, granting the appellees' Motion to Dismiss. In light of the Court's decision, petitioners now petition this Court for Writ of Certiorari to review that judgment.

## REASONS FOR GRANTING WRIT

### A. The Fifth Amendment to the United States Constitution Provides for Both Procedural Due Process Protection and Equal Protection of the Law.

Section 7483 of Title 26 U.S.C. is violative of the Due Process and Equal Protection clauses of the Fifth Amendment to THE CONSTITUTION OF THE UNITED STATES. This claim is based on several grounds: First, that there is no "provision" in the statute allowing for any form of "notice" from the Clerk of the Tax Court of an adverse decision by the Tax court; a clear violation of procedural due process. If

one wishes to exercise his right to appeal pursuant to Section 7483, the appellant has 90 days in which to do so. The countdown of the 90 days starts when the Tax Court's decision has been "entered." The statute does not require the Clerk of the Tax Court to notify the taxpayer of any such "entry" of judgment. However, as a general matter of practice, a decision, once rendered by the Tax Court, is mailed to the taxpayer from Washington, D.C. Because of the differences in distance between the several states and the normal time it takes for mail to travel when carried by the United States Postal Service, a party domiciled on the west coast will receive the Clerk's casual notice of a decision of the U.S. Tax Court at a later point in time than a party domiciled on the east coast (the amount of time in question could easily be as great as 72 hours or more). Thus, taxpayers on

the east coast receive such casual notice three days or more in advance of taxpayers on the west coast. As will be discussed with more particularity below, the Federal Rules generally recognize this inherent time differential by allowing an additional three days to file pleadings and other papers when the filing of the pleading or other paper is prompted by a document or notice delivered by the mails. However, Section 7483, on its face, does not provide for such a three-day period with respect to an appellant's most important right: his right to appeal an adverse decision of the Tax Court to the United States Court of Appeals. The failure to allow for additional time for filing a notice of appeal of a Tax Court decision results in an unjust and unequal treatment of taxpayers, such as the petitioners herein.

The statute then, on its face and in its application violates equal protection of the law, unless this Honorable Court decides that the relevant Federal Rules of Appellate Procedure, which provide for a three-day "grace period" when mails are utilized, are also applicable to filing a notice of appeal pursuant to Section 7483.

The Fifth Amendment clearly limits the powers of the federal government, in that it cannot deprive a person of his property without due process of law. However, no specific clause exists in the Fifth Amendment with respect to equal protection of the laws, nor does it provide for guarantees against discriminatory legislation by Congress. In the landmark decision of Bolling v. Sharpe, 347 U.S. 497 (1954) at 499, the Fifth Amendment due process clause was expressly held to encompass an equal protection application federally:

> "The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The 'equal protection of the law' is a more explicit safeguard of prohibited unfairness than 'due process of law,' and, therefore, we do not imply that the two are always interchangeable phrases. But, as this court has recognized, discrimination may be so unjustifiable as to be violative of due process."

See also the following cases in which it was held that equal protection of the law is firmly recognized in the Fifth Amendment: Bolton v. Harris 395 F.2d 642 (1968); Frontiero v. Richardson 411 U.S. 677 (1973); Weinberger v. Wiesenfeld 420 U.S. 636 (1975); Schlesinger v. Ballard 419 U.S. 498 (1975); Shapiro v. Thompson 394 U.S. 618 (1969); Schneider v. Rusk 377 U.S. 163 (1964). Further, this protection has also been established in the California Ninth Circuit case of United States v. Thoresen 428 F.2d 654 (1970) at 658:

> "The Due Process Clause of the Fifth Amendment provides essentially the same safeguard against invidious and unjustifiable discrimination in federal laws as the Equal Protection Clause of the Fourteenth Amendment does in the case of state laws." (citations omitted)

Therefore, if some persons are given a particular advantage, as argued here, by the federal government stemming from a legislative act of Congress, it is discriminatory not to treat others similarly situated in the same way. When this occurs, it is left to the courts to render justice by striking down as unconstitutional a statute which permits such discrimination.

B. Once a Method for Appellate Review has been Established as a Matter of Right, It Must be Exercised without Discrimination.

A taxpayer who faces an adverse decision of the United States Tax Court in Washington, D.C. can appeal that decision

as a matter of right, with exclusive jurisdiction pursuant to 26 U.S.C. 7482 being in the United States Court of Appeals.

This right is further established, and can be exercised by following the procedures as outlined in the statute which is heretofore now under attack (26 U.S.C. 7483), and which is also prescribed in Federal Rule of Appellate Procedure, Rule 13(a), and United States Tax Court Rules of Practice and Procedure, 190(a).

Under the Fourteenth Amendment of the United States Constitution, there is no requirement that states provide any avenues of appeal in civil cases. However, when a state does provide for an appellate process, due process and equal protection of the law must apply to all parties seeking relief.

> "This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, . . . (citations omitted)

> When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." (citations omitted)

Lindsey v. Normet, 405 U.S. 56, 77 (1971).

This law has also been followed by the Ninth and Fifth Circuit Courts of Appeal in the United States.

> "Generally, there is no requirement of due process that a state provide for appellate review of civil cases. (citations omitted) . . . However, the appeal process which is created 'must be exercised without discrimination.'"

Oppenheimer v. Roth 468 F.2d 901, 902 (Ninth Cir. 1972).

> "Due process requires that a state, once it establishes avenues of appellate review, must keep those avenues free of unreasoned distinctions that impede open and equal access to the courts. (citations omitted . . . A defendant's right of appeal must be free and unfettered."

Robinson v. Beto 426 F.2d 797 (Fifth Cir. 1970).

Carrying this argument one step further, a similar due process argument under the

Fifth Amendment can also be made. As discussed above in this Petition, the federal government cannot, acting on its own discretion, afford to a party any less due process protections than those that the states guarantee. The requirements of due process is the same under the Fifth Amendment as it is under the Fourteenth Amendment, save for the fact that one applies to the federal government while the other applies to the states.

Therefore, bound by the same due process requirements under the Fifth Amendment as established by the Fourteenth Amendment which applies to the states, once the federal government has established avenues of appeal for a party as a matter of right, those avenues must be free of "unreasoned distinctions" and exercised without discrimination. If a statute which provides for an appeal as a matter of right, in particular, 26 U.S.C. 7483, does not take

care to fully protect that right procedurally, or if that statute discriminates, then it must be struck down as unconstitutional.

C. One of the Basic and Fundamental Requirements of Procedural Due Process is Notice.

Under both the Fifth and Fourteenth Amendments to the Constitution, due process requires, at a minimum, the right to NOTICE and an opportunity to be heard, before a party can be deprived of his rights or property.

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" (citations omitted)
>
> * * * *
>
> "It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'"

* * * *

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions."

* * * *

"If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented."

* * * *

"This is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments"

Fuentes v. Shevin 407 U.S. 67 (1972).

See also: Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Boddie v. Connecticut 401 U.S. 371 (1971); Griffin v. Griffin 327 U.S. 220 (1946).

Due process forbids any exercise of judicial power substantially affecting a defendant's rights without notice; Schroeder v. City of New York, 371 U.S. 208 (1962). An elementary and fundamental

requirement of due process in any proceeding is notice reasonably calculated under all circumstances to apprise the interested parties of pendency of action and afford them an opportunity to present their objections. Covey v. Town of Somers 351 U.S. 141 (1956).

Since no mandatory notice provision of a decision of the United States Tax Court is embodied in 26 U.S.C. 7483, a taxpayer may not be fully apprised of his right to exercise an appeal. If, due to lack of notice, a taxpayer were to fail to timely file a Notice of Appeal of a decision of the Tax Court, nevertheless the decision becomes final, and the taxpayer's right to appeal is forever lost and becomes unreviewable under 26 U.S.C. 7481. Even if a taxpayer is promptly notified by the Clerk of the Tax Court of the "entry" of judgment in a Tax Court proceeding, a taxpayer residing on the west coast would

not be treated equally, within the equal protection and due process requirements of the constitution, with his counterparts on the east coast, unless this Honorable Court determines that Rule 26(c) of the Federal Rules of Appellate Procedure is to be applied with respect to the computation of the requisite period for filing a Notice of Appeal pursuant to 26 U.S.C. 7483. It is respectfully submitted that the statute in question (Section 7483) cannot withstand the scrutiny of a constitutional test without superimposing the requirement that the subject 90-day period must be extended for three days, after casual notice is mailed to the taxpayer by the Clerk of the Tax Court.

Further, casual notice, or notice as a matter of favor, which is now utilized under 26 U.S.C. 7483, cannot be used as a substitute for due process of law.

"Nor can extra-official or casual notice . . . as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In Stuart v. Palmer, 74 N.Y. 183, 188, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this court. Thus, in Security Trust Co. v. Lexington, 203 U.S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: 'If the statute did not provide for a notice in any form, is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute' (citing the New York case). So, in Central of Georgia Ry. v. Wright, 207 U.S. 127, 138, the court said: 'This Notice must be provided as an essential party of the statutory provision and not awarded as mere matter of favor or grace.' In Roller v. Holly 176 U.S. 398, 409, the court declared: 'The right of a citizen to due process of law must

> rest upon a basis more substantial than favor or discretion.' And in Louis. & Nash, R. R. v. Stock Yards Co., 212 U.S. 132, 144, it was said: 'The law itself must save the parties' rights, and not leave them to the discretion of the courts as such."

Coe v. Armour Fertilizer Works 237 U.S. 413, 424 (1915).

In the present case, the decision of the United States Tax Court was entered against petitioners on August 30, 1979. Casual notification of that decision by the Clerk was not received until several days after that decision was entered, because the petitioner herein and his counsel reside on the west coast. Therefore, due process was not afforded, because appellants did not have the full 90 days with which the legislature has chosen to provide for the filing of a Notice of Appeal to the Tax Court as a matter of right.

D. When the Postal Service is Utilized as a Means of Communi-

cation, Additional Time in Which to File a Notice of Appeal Must be Allowed.

Petitioners argue that when the postal service is utilized as a means of communication, Federal Rule of Appellate Procedure, Rule 26(c), can and must be utilized in computing the time period for noticing an appeal. Rule 26(c) allows a party three additional days in which to respond by mail when a specified period of time has been prescribed to perform an act. In this case, the petitioner was permitted as a matter of right to exercise his right to appeal the decision of the Tax Court. The Clerk of the Tax Court sent, by mail, the Court's decision, which was entered on August 30, 1979. Since the postal service was utilized, the petitioner should have been allowed an additional three days in which to notice his appeal. If this Honorable Court finds that the rules of

Federal Appellate Procedure require such additional three-day period, then the Notice of Appeal filed in this case would have been filed on a timely basis. Rule 26(c) is applicable to appeals from decisions of the Tax Court. (All provisions of the Federal Rules of Appellate Procedure are applicable to a review of a decision of the Tax Court, except that Rules 4-9, 15-20, 22 and 23 are not applicable. See Rule 14, Federal Rules of Appellate Procedure.) Thus, Rule 26(c) recognizes that at any time that a party is required or permitted to do an act within a prescribed period, after service of a paper upon him, and the paper is served by mail, three days shall be added to the prescribed period. This recognizes the fact that some inherent delays are occasioned by use of the mail, and affords due process to all appellants regardless of where they live. It is the position of this petitioner that

Rule 26(c) should be deemed applicable to the most important act of an appellant in his entire appeal process, namely, noticing his appeal.

## CONCLUSIONS

For these reasons, a Writ of Certiorari should issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

WILLIAM B. TREITLER
Attorney for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

| | |
|---|---|
| DONALD W. FAUSNER and ANITA C. FAUSNER, | No. 79-7661 |
| Petitioners-Appellants, | TAX# 10819-76 Washington (San Diego) |
| vs. | ORDER |
| COMMISSIONER OF INTERNAL REVENUE, | |
| Respondent-Appellee. | |

Before: HUG and NELSON, Circuit Judges

Upon due consideration, the court issues the following order:

(a) appellants' motion for extension of time, until April 11, 1980, in which to file an opposition to the motion to dismiss is granted; and

(b) appellees' motion to dismiss the appeal for lack of jurisdiction is

granted. Appellants failed to file a timely notice of appeal from the Tax Court's decision, pursuant to 26 U.S.C. 7483. They have raised no persuasive grounds to hold 7483 unconstitutional.

Mo Cal 5/5/80

APPENDIX B

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NOTICE OF APPEAL TO COURT OF APPEALS
UNITED STATES TAX COURT

| | |
|---|---|
| DONALD W. FAUSNER and ANITA C. FAUSNER<br><br>Petitioners,<br><br>v.<br><br>COMMISSIONER OF INTERNAL REVENUE,<br><br>Respondent | Docket no. 10819-76 |

NOTICE OF APPEAL

Notice is hereby given that DONALD W. FAUSNER and ANITA C. FAUSNER, Petitioners, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the decision of this court entered in the above captioned proceeding on the 30th day of August, 1979.

# APPENDIX C

## STATUTES INVOLVED

1) Fifth Amendment to the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2) Pertinent parts of 26 U.S.C. 7481:

> "(a) REVIEWABLE DECISIONS - Except as provided in subsection (b), the decision of the Tax Court shall become final--
>
> > (1) TIMELY NOTICE OF APPEAL NOT FILED - Upon the expiration of the time allowed for filing a notice of appeal, if no such notice has been duly filed within such time; or

(b) NONREVIEWABLE DECISIONS - The decision of the Tax Court in a proceeding conducted under Section 7463 shall become final upon the expiration of 90 days after the decision is entered."

3) Pertinent parts of 26 U.S.C. 7482:

"(a) JURISDICTION - The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in Section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in Section 1254 of the United States Code.

(b) VENUE.

(1) IN GENERAL - Except as otherwise provided in paragraphs (2) and (3), such decisions may be reviewed by the United States Court of Appeals for the circuit in which is located -

(A) in the case of a petitioner seeking redetermination of tax liability other than a corporation, the legal residence of the petitioner . . ."

4) Section 7483 of the Internal Revenue Code (26 U.S.C.):

"Review of a decision by the Tax Court shall be obtained by filing a notice of appeal with the Clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered."

5) Federal Rules of Appellate Procedure,

Rule 13(a):

"Review of a decision of the Tax Court of the United States shall be obtained by filing a notice of appeal with the Clerk of the Tax Court within 90 days after the decision of the Tax Court is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the decision of the Tax Court is entered."

6) Federal Rules of Appellate Procedure,

Rule 26(c):

"(c) Additional Time after Service by Mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period."

7) Rules of Practice & Procedure,

United States Tax Court, Rule 190(a).

"(a) General: Review of a decision of the Court by a United States Court of Appeals is obtained by filing a notice of appeal with the Clerk of the Tax Court within 90 days after the decision is entered. If a timely notice of appeal is filed by one party, any other party may take an appeal by filing a notice of appeal within 120 days after the Court's decision is entered. Code Section 7483. For other requirements governing such an appeal, see Rules 13 and 14 of the Federal Rules of Appellate Procedure."

Supreme Court, U. S.
FILED
SEP 9 1980
MICHAEL RODAK, JR., CLERK

No. 80-362

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD W. FAUSNER *and* ANITA C. FAUSNER,
*Petitioners,*

*v.*

COMMISSIONER OF INTERNAL REVENUE,
*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX D

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SUPPLEMENTAL
APPENDIX D

T.C. MEMO. 1979-348

UNITED STATES TAX COURT

DONALD W. FAUSNER and ANITA C. FAUSNER, Petitioners
v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 10819-76.
Filed August 30, 1979.

P, an airline pilot, used his private automobile to drive between his residence in San Diego and his place of employment in Los Angeles, a distance of 126 miles. He was required by his employer to transport bulky, job-related materials. Held, P failed to prove that he would not have used his private automobile "but for" the necessity of transporting his job-related materials; therefore, the expenses of such trips represented nondeductible personal commuting expenses.

William B. Treitler, for the petitioners.

Timothy L. Nelson, for the respondent.

## MEMORANDUM FINDINGS OF FACT AND OPINION

SIMPSON, Judge: The Commissioner determined deficiencies in the petitioners' Federal income taxes as follows:

| Year | Deficiency |
|---|---|
| 1973 | $ 557.77 |
| 1974 | 2,476.56 |

The petitioners have conceded certain adjustments made by the Commissioner. The sole issue for decision is whether the petitioners are entitled to deduct the cost of Mr. Fausner's transportation between his residence and his place of employment because he was required to carry certain work-related materials.

## FINDINGS OF FACT

Some of the facts have been stipulated, and those facts are so found.

The petitioners, Donald W. and Anita C. Fausner, husband and wife, maintained their legal residence in San Diego, California, at the time they filed their petition in this case. They filed their joint Federal income tax returns for the years 1973 and 1974 with the Internal Revenue Service, Fresno, California. Mr. Fausner will sometimes be referred to as the petitioner.

The petitioner is a commercial airline pilot, a captain, who, at the time of trial, had been employed by American Airlines (American) for 28 years. He was 48 years old in 1973. During the period in issue, he was based at Los Angeles International Airport (LAX), Los Angeles, California, but during such period, he resided in San Diego, California.

American requires the petitioner to wear a pilot's uniform. The uniform may not be worn offduty, but it may be worn while in transit to and from an airport. American also requires the petitioner to report to work with certain items of equipment, such as charts and manuals, a flashlight, handcuffs, flight computer, plotters, licenses, certificates, name plates, and other materials. These materials must be carried on all flights by the petitioner so as to be readily available for use. Such materials weigh approximately 25 pounds and are carried by the petitioner in a flight kit bag the dimensions of which are 18" x 24" x 6". In addition, because he may not wear his uniform offduty, the petitioner carries an overnight bag containing personal clothing. The weight of the overnight bag varies, depending upon the petitioner's destination and the duration of his assignment. The overnight bag usually weighs approximately 30 pounds and its dimensions are 24" x 24" x 6".

American did not provide storage facilities for the petitioner's job-related materials, nor did it provide a locker room where he could change from his civilian clothes into his uniform. Thus, as a practical matter, the petitioner was required to travel between his residence and place of employment in uniform and to carry with him his flight bag and overnight bag.

During 1973 and 1974, the petitioner made 73 round trips between his residence in San Diego and LAX in connection with his assigned flights. On each of these trips, the petitioner drove his automobile. The distance between San Diego and LAX is 126 miles, and by automobile,

the trip takes 2-1/2 hours. On each trip, the petitioner carried the flight bag and overnight bag in the automobile with him and incurred no additional expense as a result of transporting such bags.

On some occasions, when not reporting for flight duty and not carrying baggage, the petitioner used public transportation to travel between his residence and LAX. When using public transportation, he took an express bus, which stopped three blocks from his residence, to downtown San Diego. In downtown San Diego, he walked one block to a bus which took him to the San Diego International Airport. From San Diego, he flew to LAX without charge or with only a nominal charge. The bus between the petitioner's residence and downtown San Diego ran every 30 minutes to an hour during the week days and hourly on the weekends, and it operated from around 5:00 a.m. to around 7:00 p.m. The trips took approximately 1 hour and 10 minutes and cost 25 cents, including a transfer. The bus between downtown San Diego and the San Diego Airport ran every 20 to 30 minutes and operated from around 5:00 a.m. to around midnight each day. The trip took 20 minutes.

American pilots can "bid" for the flight assignments that they prefer, and because of his seniority, the petitioner can usually secure the flights he desires. He prefers to fly the Boeing 707 on night flights. He was required to be present at LAX 1 hour in advance of a scheduled flight. On 38 of the 73 trips which he made, the petitioner, if he had used public transportation, would have been required to spend between 2 and 12

additional hours in transit because of the unavailability of either airline or bus transportation.

On their Federal income tax returns, the petitioners deducted $2,082.00 in 1973 and $2,737.50 in 1974 as the costs of Mr. Fausner's traveling between San Diego and LAX. In his notice of deficiency, the Commissioner disallowed such deductions in their entirety.

OPINION

The sole issue presented for decision is whether the petitioners are entitled to deduct the cost of Mr. Fausner's travel between his residence in San Diego and his place of employment at LAX. Deeply ingrained in the tax law is the proposition that the cost of traveling between one's home and place of employment is a nondeductible personal expenditure. Steinhort v. Commissioner, 335 F.2d 496, 503 (5th Cir. 1964); Foote v. Commissioner 67 T.C. 1, 6 (1976); secs. 1.162-2(e), 1.262-1(b)(5), Income Tax Regs. In Sullivan v. Commissioner, 1 B.T.A. 93, 95 (1924), the rationale for such rule was set forth when the Court adopted the following language:

> "Obviously an individual is free to fix his residence wherever he chooses. He fixes it according to his personal convenience and inclinations, as a matter separate and apart from business. Any expense, therefore, incident to such residence as fixed by the individual is a matter personal to him. If he prefers, for personal reasons, to live in a different city

> from that in which his business or employment is located, any expense incident to so doing is the result of decision based upon personal convenience and preference, and it is not the result of anything undertaken for business purposes and, therefore, is not a business expense."

Yet, it is recognized that there may be an exception to such rule when an employee is required to carry tools or other work-related materials to and from his work. In Fausner v. Commissioner, 413 U.S. 838 (1973) (which involved the present taxpayer who then lived in New York), the Supreme Court held that an employee is allowed a deduction for any additional expenses incurred by him in carrying such work-related materials between his residence and his work. However, in that case, the petitioner was not allowed a deduction because it was agreed that he would have used his automobile to commute between his residence and his work, irrespective of whether he was required to carry the work-related materials. Since he would have driven in any event, the carrying of such materials did not cause him to incur any additional expenses. See also Hitt v. Commissioner, 55 T.C. 628 (1971), and Gilberg v. Commissioner, 55 T.C. 611 (1971), in which this court also denied a deduction for commuting expenses because the employee would have commuted by automobile even though he was not required to carry the work-related materials.

In the case now before us, Mr. Fausner attempts to distinguish his earlier case by claiming that he would have used public transportation to commute between his residence in San Diego and his place

of employment at LAX were it not for the necessity of traveling in his uniform and carrying a flight bag and overnight bag. The petitioner has the burden of proof (Rule 142, Tax Court Rules of Practice and Procedure; Welch v. Helvering, 290 U.S. 111 (1933)), and we are not required to accept as a fact his statement of what he would have done "but for" the necessity of carrying the work-related materials (Anderson v. Commissioner, 55 T.C. 756, 758 (1971)). After evaluating such testimony, together with the other evidence in this case, we are not convinced that Mr. Fausner would have used public transportation were it not for the requirement that he carry the work-related materials.

There are several reasons for doubting the petitioner's claim. On the majority of days, there was no convenient connecting flight, and if he had not driven, he would have had a delay of several hours either in the pilot's lounge at LAX or elsewhere while in transit. The petitioner argues that because of his seniority, he could have secured other assignments whenever there were no convenient flights between San Diego and LAX, but in that event, he might have to sacrifice his desires as to the types and times of flights that he worked. We cannot speculate over whether he would have been willing to accept other assignments or whether he would have chosen to drive to work in order to retain his preferred assignments. See Kallander v. United States, 208 Ct. Cl. 557, 563, 526 F.2d 1131, 1135 (1975).

What is more, even when there were convenient connecting flights, the use of

public transportation would have been more time consuming and inconvenient. The actual time of the two bus rides and the flight between San Diego and LAX is just slightly less than the time required to drive between San Diego and LAX, but he could not expect to walk directly on the bus from his residence to downtown San Diego, nor could he expect that the transfer bus would be waiting for him. In addition, he would have to plan to be at the San Diego Airport somewhat in advance of the scheduled flight to LAX. Thus, when the time required for waiting for the buses and the flight is included, the trip by public transportation would clearly be longer. There is also to be considered the annoyances involved in transferring from one bus to another and then transferring from the bus to the airplane. Had the petitioner really wished to avoid driving the 126 miles between San Diego and LAX, he could have driven from his residence to the San Diego Airport, left his car there, and taken a plane to LAX. In that event, he could have avoided the buses and their transfers, the aggregate traveling time would have been less, and there would have been no problem of his wearing his uniform on the plane and transporting the flight and overnight bags with him on the plane. Nevertheless, he did not even elect to make that partial use of public transportation; he chose to drive the entire 126 miles.

Finally, even if the petitioner drove between San Diego and LAX because of the necessity of wearing his uniform and carrying the flight and overnight bags, there is a serious question as to whether he would be entitled to deduct the costs

of such trips. He offered no business reason for his decision to live in San Diego although he worked out of LAX, 126 miles away. We must assume that his choice of residence was based on personal considerations. Even if he were required to drive in order to carry his work-related materials, he surely could have found some place to live in the vicinity of LAX. Thus, the length of the trip and the consequent costs result from his personal choice to live in San Diego. However, we do not actually decide such issue since it was not raised by the Commissioner. Yet, for the reasons given previously, we hold that the petitioners are not entitled to deduct the costs of Mr. Fausner's trips between San Diego and LAX.

Decision will be entered for the respondent.

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-362

# In the Supreme Court of the United States

OCTOBER TERM, 1980

DONALD W. FAUSNER AND ANITA C. FAUSNER,
PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
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## TABLE OF AUTHORITIES


Page

Cases:

*Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233 ..... 3

*Blackledge* v. *Perry*, 417 U.S. 21 ..... 4

*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 ..... 4

*Drawdy Investment Co.* v. *Leonard*, 261 F. 2d 226 ..... 4

*Fausner* v. *Commissioner*, 413 U.S. 838 ..... 1

*Johnson* v. *Railway Express Agency, Inc.*, 489 F. 2d 525 ..... 4

*Lashley* v. *Ford Motor Co.*, 518 F. 2d 749 ..... 5

*Lindsey* v. *Normet*, 405 U.S. 56 ..... 4

*Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81 ..... 5

*Vibro Mfg. Co.* v. *Commissioner*, 312 F. 2d 253 ..... 3

*Williams* v. *Oklahoma City*, 395 U.S. 458 ..... 4

Statutes, regulations and rules:

Internal Revenue Code of 1954 (26 U.S.C.):

Section 7483 ..... 2

Section 7502(a) ..... 2, 3

Section 7502(b) ..... 2, 3

Page

Statutes, regulations and rules —Continued:

Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.):

Section 301.7502-1(c)(1)(iii)(a) ..... 2

Section 301.7502-1(c)(1)(iii)(b) ..... 2

Fed. R. App. P. 26(c) ..... 5

Fed. R. Civ. P. 77(d) ..... 4, 5

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## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners seek review of the dismissal of their appeal on the ground that their notice of appeal had not been timely filed.

The pertinent facts are as follows: Petitioners commenced this proceeding in the United States Tax Court seeking redetermination of deficiencies in their federal income taxes for 1973 and 1974 resulting from the Commissioner's disallowance of certain deductions claimed for commuting expenses.[1] The Tax Court entered its decision upholding the Commissioner's determination on August 30, 1979 (Pet. Supp. App. 1-9). Petitioners'

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[1]Petitioners are the same persons who were involved in *Fausner* v. *Commissioner*, 413 U.S. 838 (1973), and the substantive tax issue in the present litigation is similar to the one considered in the earlier case by this Court.

attorney thereafter attempted to perfect an appeal from that decision by mailing a notice of appeal to the Tax Court (Pet. App. 29). The Tax Court received the notice on December 3, 1979, which was more than 90 days after the date of the decision. The envelope in which the notice of appeal was mailed bore both a private postmark date of November 28, 1979, the 90th day after the Tax Court decision, and a United States Postal Service postmark date of November 29, 1979, the 91st day after that decision. The court of appeals concluded that the notice of appeal was untimely and accordingly dismissed the appeal for lack of jurisdiction (Pet. App. 27-28).

1. The decision below correctly dismissed petitioners' appeal. Section 7483 of the Internal Revenue Code of 1954 (26 U.S.C.) provides that review of a decision of the Tax Court may be obtained by filing a notice of appeal with the clerk of that court within 90 days after the decision is entered. Under Section 7502(a) of the Code, however, a notice of appeal which is received after the expiration of that time may nevertheless be considered to have been timely filed where the cover in which it was mailed bears a United States postmark showing a date within the prescribed 90-day period. Under Section 7502(b), this rule may also apply in the case of private postmarks, but only to the extent expressly allowed by regulation. Section 301.7502-1(c)(1)(iii)(a) of the Treasury Regulations on Procedure and Administration (1954 Code) (26 C.F.R.) specifically provides that, if the United States Post Office postmark shows a date after the prescribed due date, the document is not considered to be timely filed, regardless of when it was deposited in the mail. Section 301.7502-1(c)(1)(iii)(b) of the Regulations further provides that if the envelope for the document discloses both a private postmark and a United States Post Office postmark, the private postmark is to be disregarded.

Since the Postal Service postmark on the envelope in which petitioner's notice of appeal was mailed was dated November 29, 1979, the 91st day after entry of the Tax Court decision, the notice of appeal was not timely filed under either Section 7502(a) or the Regulations under Section 7502(b). The late filing of a notice of appeal therefore deprived the court of appeals of jurisdiction to review the decision of the Tax Court (*Vibro Mfg. Co.* v. *Commissioner*, 312 F. 2d 253 (2d Cir. 1963)).

2. Petitioners argue (Pet. 9-23) that the dismissal of their appeal for a late filing denies them equal protection and due process of law, and consequently that the late filing here should not be treated as depriving the court of appeals of jurisdiction. Petitioners observe (Pet. 10) that notice of the entry of a Tax Court decision is transmitted to a taxpayer by mail and that mail from Washington, D.C. may require a longer time to reach West Coast destinations than it does to reach other destinations. They argue (Pet. 10-11) that West Coast residents may thus have less time in which to perfect an appeal than residents of other areas. The allowance of a lesser amount of time, they assert (Pet. 9-18), violates their right to due process and equal protection. Petitioners also argue (Pet. 18-23) that the Tax Court is not required by statute to provide notice of entry of a decision, and that, consequently, any notice provided is casual or as a matter of favor, and therefore in derogation of the requirements of due process.

But the record reveals and petitioners admit (Pet. 6) that they received notice of the Tax Court's decision within four days of its entry and, thus, had 86 days in which to file a timely notice of appeal. Cf. *Anderson Nat. Bank* v. *Luckett*, 321 U.S. 233, 246 (1944). For the Equal Protection Clause to be violated by a particular practice required by rule in the taking of an appeal, the rule must bring about an unreasoned discrimination impeding or

limiting the prejudiced party's access to the appellate court. See, *e.g.*, *Blackledge* v. *Perry*, 417 U.S. 21, 25 n.4 (1974); *Lindsey* v. *Normet*, 405 U.S. 56 (1972); *Williams* v. *Oklahoma City*, 395 U.S. 458, 459 (1969). As the facts of this case demonstrate, any difference in the time available for residents of the West Coast and residents of other areas to take an appeal is insubstantial and does not limit access to the appellate court.[2]

By the same token, having received notice of the Tax Court's decision in ample time to perfect a timely appeal, petitioners are in no better position to raise a serious question as to the adequacy, for purposes of the Due Process Clause, of the notice procedures followed by the Tax Court. Cf. *Drawdy Investment Co.* v. *Leonard*, 261 F. 2d 226, 228-229 (5th Cir. 1958). Even though not required by statute, it is the practice of the Tax Court to send all parties formal notice of the entry of decision, and it followed that practice here. There is accordingly no basis for petitioners' contention (Pet. 10, 20-23) that the Tax Court's notice of the adverse decision was merely "casual" or "a matter of favor."[3]

Indeed, the Federal Rules of Civil Procedure have long provided that failure of the clerk of a district court to give notice of an adverse judgment does not affect the normal running of the time for filing notice of appeal. Fed. R.

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[2]The drafting of a notice of appeal and its mailing hardly require an inordinate effort over a long period of time. Cf. *Lindsey* v. *Normet*, *supra*, 405 U.S. at 65; *Johnson* v. *Railway Express Agency, Inc.*, 489 F. 2d 525, 530 (6th Cir. 1974).

[3]*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915), upon which petitioners rely (Pet. 22-23), is distinguishable. There, the governmental authority did not provide notice of the actions in question as a matter of practice.

Civ. P. 77(d). The constitutionality of that provision has never been doubted. As the Second Circuit observed in *Nichols-Morris Corp.* v. *Morris*, 279 F. 2d 81, 82-83 (1960), Rule 77(d) simply makes it incumbent on the individual litigant and his attorney to follow the process of the litigation and to apprise themselves of any judgment entry that might be made. Here, of course, petitioners and their attorney were apprised by the Tax Court itself of the adverse decision in sufficient time to file a notice of appeal, but simply failed to do so.

3. Petitioners also contend (Pet. 24-26) that Rule 26(c) of the Federal Rules of Appellate Procedure applies to the filing of a notice of appeal from a Tax Court decision so as to give them an extra three days in which to mail their notice of appeal. That rule, however, is inapplicable on its face. It provides: "Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period." A person seeking to appeal a Tax Court decision is not permitted or required to file the notice within a prescribed period from the service on him of a paper. Rather, he is required to act within a prescribed time from the entry of the Tax Court's decision. Consequently, the provision of Rule 26(c) pertaining to actions taken after the service of papers does not enlarge the time in which petitioners may file their notice of appeal. See *Lashley* v. *Ford Motor Co.*, 518 F. 2d 749, 750 (5th Cir. 1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
*Solicitor General*

OCTOBER 1980

DOJ-1980-10